

Agenda  
WDFW Oiled Wildlife Care Standards Rulemaking  
Stakeholder Workshop  
June 24, 2003  
9 am – 1 pm  
Washington State Library

**9:00 am**      **Welcome & Introductions** – Eric Larsen, WDFW Oil Spills Manager

**9:15 am**      **WDFW's Approach** – WDFW Oil Spills Staff

- **What** is WDFW doing?
- **Why** this rulemaking?
- **How** is WDFW developing standards?
- **When** will all this happen?

**9:45 am**      **Stakeholder Input**

- Discussion of key questions, concerns & issues to be addressed in the rulemaking process

**11:00 am**      **Break**

**11:15 am**      **Stakeholder Concerns & Issues, con't.**

**12:45 pm**      **Next Steps**

**1:00 pm**      **Adjourn**

**WDFW Oiled Wildlife Care Standards Rulemaking  
Stakeholder Workshop - Summary  
June 24, 2003**

**Welcome and Introduction**

Eric Larsen, Washington Department of Fish and Wildlife (WDFW), welcomed participants and briefly reviewed the workshop's purpose along with the goals of his agency.

Eric explained WDFW is responsible for the provision of technical advice on oil spill response to oiled wildlife. (He clarified that he was talking specifically about birds. When it comes to marine mammals, other agencies have jurisdiction.) WDFW also assesses the damage to natural resources in the aftermath of a spill.

The focus of the rulemaking process that WDFW will be undertaking in the coming months will be on those components critical to the success of a response and rescue operation. Eric emphasized that WDFW is committed to employing the best available science throughout this rulemaking process.

WDFW has decided to move ahead with the development of new rules for 4 reasons (outlined in the WDFW Fact Sheet):

- (1) In response to public expectations;
- (2) To fulfill the legislative intent of Revised Code of Washington (RCW) 90.56;
- (3) As a means to work with its sister agency, Ecology; and,
- (4) In order to answer clear and reasonable expectations through a process that will be fair to all parties involved or affected.

Noelle Nordstrom, WDFW, provided more detail about the rulemaking process. Noelle explained that new rules will be limited to only those things critical to the success of a wildlife operation. She reiterated Eric's assurance that WDFW would be using the "best available science" and defined that as the use of credible sources and defensible arguments. Noelle explained that WDFW has contracted with in-house experts at the University of California at Davis (UCD) to provide a report for the agency. The team at UCD was asked to collect and filter data and available science on wildlife rescue. The final product is expected at the end of June.

Noelle discussed a letter, distributed at the meeting, highlighting the critical components that UCD expects to emphasize in the final report:

- Qualified Responders
- facility design, space requirements, utility demands
- air quality, quantity, exchange rate, temperature
- water quality, quantity, softness
- time frame at which components must be running
- variation in responses in accordance with volume of spill and magnitude of affected birds.

In addition to their written report, the UCD team will also provide a spreadsheet formulated to compute damage estimates based on different input variables. Noelle added the UCD team has exceeded WDFW's expectations with the robustness of the spreadsheet.

Next, Andy Carlson, WDFW, reported on the logistics of the rulemaking procedure. WDFW will complete all work in accordance with the Regulatory Fairness Act and the negotiated rulemaking process outlined in the Administrative Procedures Act. WDFW hopes to file the CR 101, notifying the public of its intent to make rules, in July. The CR 102, an actual draft rule, is set for an October filing. Before the October filing, WDFW intends to develop drafts of the rule for the group to review. The final rule will be presented to the Wildlife Commission at their December 5 meeting. The commission will review and comment on the rule, making a final decision within about 30-40 days. John Schumacher asked that a specific timeline outlining all of these goals be provided.

Public input will be solicited following the completion of the UCD report. The time period between the CR 101 and CR 102 filings will be used to engage stakeholders.

### **Stakeholder Discussion**

Frank Holmes expressed an interest in having more public input take place before the CR 101 is filed; he is concerned that once something is written down, it is stuck and the process of revision becomes much more cumbersome.

Linda Pilkey-Jarvis asked Eric whether he envisioned the present group as a core group to advise WDFW. Eric asserted that this was an outreach meeting, a "come tell us what you think" meeting. WDFW is still trying to establish the list of those who should be included in the group. Several stakeholder groups not at the workshop were mentioned: other contingency plan holders, cargo carriers, American Waterways Association, Puget Sound Steamship Operators Association, and members of the commercial fishing community. Mark Bentzen noted that these groups were aware of the meeting, but were unsure about when they should engage themselves in the process. Kip Parker suggested the wildlife rehabilitation community be added to the stakeholder list. Experts from that group could bring important information to bear. The size of the group at this workshop wasn't meant to be restrictive, but the goal was to have a diversity of interests around the table while still maintaining a manageable group size.

Darlene DeGhetto asked about the involvement of the Washington Wildlife Rescue Coalition. Eric replied they have a role in conjunction with the UCD study, but their role in the rulemaking portion, which is a WDFW task, is still unclear.

Mark then asked if this core group was advisory only or if there would be a collective "sign off" as the rules are written. John added that he would like some involvement in the rulemaking, especially from an industry standpoint. Eric had no definitive answer, but did say that it is his agency's corporate mandate to advocate for the resources, so WDFW will move forward, even without the full support of the group. Noelle added that

the agency's role was very straightforward as it was limiting its rules to critical aspects explicitly outlined by the UCD report.

Eric added that he would like the process to be cooperative. He hopes that writing some kind of draft for review will foster creative thinking and innovation. It is not the intention of his agency to fossilize anything. With such an aggressive timeline, several people noted WDFW will have to put something down on paper soon for comment.

Kip asked if the CR 103 is the actual rule, or if the Commission can further edit the rule. Andy explained that the draft CR 102 is submitted in the CR 103, at which point the Commission can do whatever they want to it before adopting the final rule.

Kip asked whether WDFW would be using any incorporation-by-reference in the rule to point to scientific documentation for the standards. Eric commented that it is easier to tweak a document than to rewrite a rule. WDFW has used both methods in the past and isn't married to one or the other. Frank commented that any components of a rule that would be enforced should be in the rule language itself rather than referenced.

Darlene asked how species variations would be addressed in the study. UCD looked at past spills on the West Coast and made some basic assumptions based on bird size. The UCD product will address the needs of birds similar in size to common murre. Accounting for species variation probably will be qualified, not quantified.

Kip asked about the inclusion of a human safety component in the new rules. Eric replied that rules will meet agency standards; safety issues will probably be coordinated with Washington State Labor and Industry and federal OSHA standards.

Charlie Hebert, USFWS, discussed new rulemaking at the national level. A new oil spill-specific rule along with a "Best Practices" document is being incorporated into USFWS policy. The intent of the "Best Practices" document and the rule is to establish a set of minimum standards and create a special-purpose permit for oiled wildlife rehabilitators. The draft version of the document was published last year and a final copy should be published soon. Charlie added that in the future, spill responders would be narrowed to those with general permits who actually have spill experience.

Frank commented that it would be very interesting to compare the "Best Practices" document to the UCD report. Eric agreed, adding that the UCD report did use the original version of the "Best Practices" document in its research.

The group discussed the relationship between the federal and state agencies and permits. Currently, at the federal level, everyone has the same general purpose permit, but in the future there may be a more specific permit for those working with oiled birds. Mark asked how the new federal regulations would be written into a contingency plan and how plan holders would find capable contractors and get federal approval at the time of a spill. Eric said that in the current model, Unified Command has the final say. Linda added that the bottom line in Washington is the state's high standards. Ecology is not sure how the

rule will affect the contingency plan process. She also questions how the document will affect the potential spiller who isn't required to plan. Mary Sue Brancato asked if the new rule would ensure that funds are allocated to education and training. Charlie replied that the rule wouldn't ensure funding but it would ensure that the best-qualified responders were hired.

Mike Condon asked for clarification of expectations in the WDFW rule between the number of birds affected and the total number of birds. He would like to see the rule scaled to the magnitude of the damage. Eric responded under no model do you have access to all birds – the expectation is not to see total birds present and potentially impacted in numbers over 100,000 in Washington. The UCD team was looking at numbers and assumptions based on previous spills, using 6% as an average for the number of birds that can be accessed.

Mark asked whether a facility would have to be fixed or mobile. Noelle responded that WDFW would like to give industries conditions to meet, then let industry decide how to meet them. There is an economic impact analysis that goes into the decision, but it is unclear at this point whether WDFW is responsible for the analysis or whether it can be part of the rulemaking process Ecology is undergoing for contingency plans.

Frank commented that the rule must contain performance-based standards. Eric added that temporal elements will also be important to consider.

Regulatory compatibility with Oregon and British Columbia is an important consideration, especially with the question of how spills in and around the Columbia River would be handled. Linda suggested there may need to be some discussions about this in the Northwest Area Contingency Plan.

Mark asked whether WDFW or Ecology would regulate the new rules. John added that, as a plan holder, the explicit authority of one agency or the other was very important. Linda asked Eric if WDFW has some authority in enforcing regulations when wildlife is being mishandled. Eric said Title 77 does grant some authority for the care of animals, but it is unclear whether this new rule falls under the title. WDFW and Ecology are in continuing discussions about agency roles in enforcement.

Mark commented on the need for rules to clarify responses to small spills. Will the rule have a threshold number of birds at which response is required? Eric responded that the main driver for the rules is magnitude: WDFW is less concerned about the ability of an RP to meet the needs of oiled wildlife in incidents involving small numbers of birds and are more concerned about care being provided to birds during incidents where large numbers of birds are oiled.<sup>1</sup> PAWS is currently the go-to organization in the event of a spill affecting only a small number of birds; however, WDFW is happy to work with anyone on more specific issues. (Ross explained that he had dealt with PAWS in the past. Their lack of 24-hour support has left him in a vulnerable position when it comes to

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<sup>1</sup> Two days after the meeting, WDFW received the product from UCD which clarified that standards to be developed will most likely not be based on a threshold number of birds.

transporting oiled birds. Kip replied that PAWS would be happy to discuss the possibility of providing 24-hour services for small-scale bird oiling incidents.) Frank commented that activities that are to be enforced must be included in the rules. If WDFW is not concerned about a small number of birds, it needs to be stated in the rules. In closing, Frank commented that the industry stakeholders would like to be involved in the decision-making process and would like for economic considerations to be taken into account. Mark concurred, adding that the plan holders bring an important and unique perspective to the table.

Kip added that his concern is that adequate standards be set for the levels of skills of those providing direct care to oiled birds.

### **Next Steps**

A summary of this meeting and timeline for the rulemaking will be provided. In addition to the summary, answers to as many of the questions raised as possible will be compiled by WDFW and distributed.

Stakeholders will have an opportunity to see the UCD study to review and comment on it. Frank expressed his interest in having a review of the UCD study complete before moving into further discussions.

Charlie will work to provide a copy of the federal “Best Practices” draft document.

People will be given at least a month’s notice before the next meeting; early August is likely at this point.

WDFW will file the CR 101, but there is no real obligation to proceed to the CR 102 within 6 months. If the timeline is too aggressive, it can be reconsidered.

Attendees were asked to forward materials from the meeting to other interested stakeholders to keep the conversations as broad as possible.

### **Attendees**

Mark Bentzen, WSMC	Chris Lane, WDFW
Mary Sue Brancato, Olympic Coast National Marine Sanctuary	Eric Larsen, WDFW
Andy Carlson, WDFW	Chris McCartan, Clean Sound Cooperative
Peggy Crain, WDFW	Ross McDonald, FES
Mike Condon, BP	Noelle Nordstrom, WDFW
Darlene DeGhetto, PAWS	Kip Parker, PAWS
Charlie Hebert, USFWS	Linda Pilkey-Jarvis, Dept. of Ecology
Frank Holmes, WSPA	John Schumacher, Tesoro

Lynn Lefkoff, EnviroIssues (Facilitator)

Courtney Caughey, EnviroIssues (Note taker)

## Questions Posed at the June 24 Stakeholder Outreach Meeting

*Question: When are you meeting with the University of California Davis group?*

Response: We met with the UC Davis research team to review their final draft report on June 26<sup>th</sup>.

*Question: How do you intend to engage all or other stakeholders?*

Response: The meeting held on June 24<sup>th</sup> was our first effort at outreach to stakeholders representing plan holders, rehabilitators, the environmental community, and state and federal agencies. We are intending that future meetings will be inclusive of all interested parties, to the extent possible. If you know of other stakeholders that you believe should be engaged in future meetings, or would like copies of the proceedings, please pass your thoughts on to them, or provide us with a point of contact, and we will ensure they are engaged.

*Question: Are you going to provide a straw man for rules or take a process-first-write-rules-later approach?*

Response: The next step in our process is to look to the science and UCD's findings to determine what care components need to be clarified through rules. It is our intention to provide stakeholders with a draft of what we anticipate rules will look like for discussion purposes prior to our next meeting.

*Question: Shouldn't the Washington Wildlife Rescue Coalition be involved?*

Response: The Coalition is involved through its Chair. Individual Coalition members should feel free to engage to the extent that they wish.

*Question: Is the CR103 the actual rule or does the language get revised after that?*

Response: The CR 103 is a statement indicating that the Fish and Wildlife Commission has approved the final version of rules. The CR 103 is filed as a result of the Commission adopting rules at its business meeting. Here are the definitions of the different filed documents:

**CR-101:** This is a pre-proposal statement of inquiry that gives the public notice that an agency is thinking about rule making on a specific subject. This allows the public an opportunity to participate in the rule making process at an early stage.

**CR-102:** This is a statement that gives the public notice that an agency will propose a rule. It is during this period that the text of the proposed rule is published and also notice is given of public hearing dates.

**CR-103:** This is a statement that indicates an agency has adopted a rule.



*Question: Will you be using the incorporation by reference method?*

Response: At this point, we do not believe that incorporation by reference will be used in our rules.

*How will the rules deal with bird species differences?*

Response: In order to make the report more manageable, we started with an assumption that involved birds of 1 kg in size. That assumption is also consistent with our wildlife rescue experience in Washington State. While differing species will have differing needs (i.e. housing, space, etc.), we believe that accommodation of critical components, based on our assumptions represents a major step forward. The matrix that UCD has developed may also allow us to adjust for differing needs in the planning process.

*Are there federal oiled wildlife rescue rules?*

There are federal rules that pertain to the issuance of federal permits. In addition, new federal rules will also address USFWS's prerogative to designate which permittees can or should be utilized for each separate spill event.

*Are personnel standards important?*

In our experience, the training and spill experience of those attending to oiled wildlife is critical. We hope to garner further clarification on this from the UCD.

*How would plan holders find or be assured of capable contractors and get federal approval in the ICS at the time of a spill?*

Decisions regarding the use and deployment of wildlife rescue responders and response contractors during Washington oil spills will be made under the authority of, a "USFWS representative or their designee", as identified in the Northwest Area Contingency Plan. Whether our rules will address "Qualified Responders" won't be determined until we are able to review the UCD report.

*What about the requirements and readiness for those RPs that are not plan holders?*

These rules will establish standards for the care of oiled wildlife. The rules will not distinguish plan holders from non-plan holders.

*How do the numbers of birds influence standards?*

Larger numbers of birds will require a larger response. Some critical components may increase or decrease as bird numbers change. The UCD report should help clarify how these changes would impact the necessary response.

*Are there going to be requirements for a fixed facility?*

No.

*What about transport issues in terms of timing?*

We are hopeful that the UCD report will provide guidance in this area.

The following are questions for which answers are not presently available:

*To what degree will rules be enforced on the Columbia between Oregon and Washington?*

*Once a rule is adopted, how would the rules be administered?*